# THE EXTENSION OF FEDERAL CONTROL THROUGH THE REGULATION OF THE MAILS.

THE recent decision[1] of the Supreme Court of the United States upholding the constitutionality of the so-called "newspaper publicity law"[2] is of more than passing importance. Popular interest, of course, attaches chiefly to the fact that periodicals, in order to enjoy what the court calls "the exceptional privileges" of second-class rates, must print the semi-annual lists of their editors and stockholders, and mark as an advertisement any reading matter for the publication of which compensation is received. From a legal standpoint, however, the case suggests, but does not decide, several highly important constitutional questions.

As paraphrased in the opinion, the contention of the government was that the law merely "imposes conditions necessary to be complied with to enable publishers to participate in the great and exclusive privileges and advantages which arise from the right to use the second class mail," and that the provision was valid "as an exertion by Congress of its power to establish post offices and post roads, a power which conveys an absolute right of legislative

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[1] Lewis Publishing Co. *v.* Morgan, 229 U. S. 288 (June 10, 1913).

[2] 37 Stat. at L. 553, ch. 389. The law requires publications entered as second-class matter (with a few exceptions) to furnish the post-office department and publish "a sworn statement setting forth the names and post-office addresses of the editor, managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months. . . . Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure."

A separate and concluding paragraph of the law provides "That all editorial or other reading matter published in any newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised, without so marking the same, shall, upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500)."

selection as to what shall be carried in the mails, and which therefore is not in any wise subject to judicial control even though in a given case it may be manifest that a particular exclusion is but arbitrary because resting on no discernible distinction nor coming within any discoverable principle of justice or public policy."

The court, however, refuses to accept this view, saying that "because there has developed no necessity of passing on the question, we do not wish even by the remotest implication to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of condition, embodied in the proposition of the government which we have previously stated." [3]

Nevertheless the case will furnish an excellent text upon which to base a discussion of the extent to which, under the guise of regulating the mails, Federal control can be carried, — a question which has not yet received adequate consideration but which must soon be answered. For, even taking into consideration the close reasoning by which the court justifies the law on the ground that it only "affixes additional conditions for admission to a privileged class of mail," the statute is in reality a regulation of journalism, and by it the federal government accomplishes something indirectly which it could not do directly. And this raises the question of the conclusiveness of the court's attitude, expressed in one case, at least, that the judiciary will not intervene to restrain "the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." [4]

It is my purpose, therefore, in the present paper, to discuss the limits to which "nullification by indirection" [5] may be extended through federal regulation of the mails.

## I. Federal Power over the Mails: a Review.

The constitutional grant of the postal power is clothed in words which "poorly express its object" and feebly indicate the particular measures which may be adopted to carry out its design. "To

[3] Lewis Publishing Co. *v.* Morgan, *supra.*

[4] McCray *v.* United States, 195 U. S. 27 (1904).

[5] The phrase is that of Mr. James M. Beck, who in the newspaper case was counsel for the Lewis Publishing Company.

establish Post Offices and post Roads" is the form of the grant; to create and regulate the entire postal system of the government is the evident intent.[6]

Under the authority given in the six words of this clause the government has classified mailable matter, its senders and recipients. Congress has exercised its power (held in all instances to be valid) of excluding articles such as lottery tickets and advertisements, poisons, obscene literature, animals, liquors, etc.; it has put special conditions on the introduction of other articles, and the violation of any of these regulations is dealt with criminally.[7] Finally, persons using the mails with intent to defraud are dealt with by federal authorities.

Such an enormous extension of the postal power, concerning the necessity for which there has been little difference of opinion in Congress, has, of course, been combated in the courts. In his message sent to Congress on the 2d of December, 1835,[8] President Jackson urged the passage of a law prohibiting, "under severe penalties, the circulation in the southern states, through the mail, of incendiary publications intended to instigate the slaves to insurrection." The message was referred to a committee of which Mr. Calhoun was chairman, and while great differences of opinion resulted, the courts were not called upon to render a decision, for the

[6] Pomeroy, Constitutional Law, 264. Or, as described by Marshall, "this power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post road, and from one post office to another. And from this implied power has again been inferred the right to punish those who steal letters from the post office or rob the mail." McCulloch *v.* Maryland, 4 Wheat. 316 (1819).

[7] For the extensive *Index Expurgatorius* which has been built up, see "Postal Laws and Regulations" (1902), 59th Cong. 2d Sess. Sen. Doc. No. 394, Pt. I, p. 321, "Unmailable Matter." It may in this connection be mentioned that the Post Office does an annual business of over five hundred millions of dollars. The second-class mail matter, carried at the rate of one cent a pound, involves an annual loss of seventy millions of dollars. Federal banking activities through the Postal Savings Law and money-order exchanges are outside the purview of this paper. For a discussion of the post office as a common carrier and bank, see 18 American Law Review, 281, and for an argument that Congress, under the postal grant, has the power to acquire and operate the railroads, see Edgar H. Farrar's brief in "Hearings before Committee on Interstate Commerce, United States Senate, 62d Congress," p. 1498. The Supreme Court, moreover, has partially relied on the postal clause to justify the acts of Congress incorporating certain railroad companies. See California *v.* Pacific Railroad Companies, 127 U. S. 1 (1887).

[8] II Statesman's Manual, 1018.

Senate concluded that Congress did not have such a power of exclusion and defeated the proposed law.[9]

The issue was not squarely raised until 1878, when the Supreme Court upheld an act of Congress [10] making it a crime for anyone knowingly to send through the mails any letter or circular concerning lotteries. The court said: [11]

"The validity of legislation prescribing what should be carried, and its weight and form and the charges to which it should be subjected, has never been questioned. . . . The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded."

Twelve years later, in sustaining the anti-lottery act of 1890 [12] the court reaffirmed this ruling and held "that the power vested in Congress to establish post-offices and post-roads embraced the regulation of the entire postal system of the country, and that under it Congress may designate what may be carried in the mails and what excluded; that in excluding the various articles from the mails the object of Congress is . . . to refuse facilities for the distribution of matter deemed injurious by Congress to the public morals." [13]

Still greater power was recognized with reference to the so-called "fraud orders," the court holding that Congress "may refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employees or injurious to other mail matter. . . . While it may be assumed, for the purpose of this case, that Congress would have no right to extend to one the benefit of its postal service, and deny it to another person in the same class and standing in the same relation to the government, it does not follow that under its power to classify mailable matter, applying different rates of post-

[9] XII Debates of Congress, 704, 754, 771; V Calhoun's Works, 191.

[10] Revised Statutes, § 3894.

[11] *Ex parte* Jackson, 96 U. S. 727 (1878). [12] 26 Stat. at L. 465.

[13] *In re* Rapier, 143 U. S. 110 (1892). In the Jackson case, however, the court says that "the difficulty attending the subject arises, not from the want of power in Congress to prescribe the regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail."

age to different articles, and prohibiting some altogether, it may not also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception, or the dissemination among its citizens of information of a character calculated to debauch public morality." [14]

A sweeping power in Congress has, therefore, been recognized, but in every instance its exercise has been direct. The laws which have been passed were aimed at the articles themselves on the ground that they were fraudulent, immoral, or dangerous; they were excluded from the mails, and persons violating this regulation are dealt with criminally. But Congress has not yet attempted to prevent the issuance of lottery tickets or the publication of obscene literature; it has simply refused to lend encouragement to immorality by permitting the use of a federal agency.[15]

## II. The Newspaper Law and its Justification.

It is evident that the "newspaper publicity law" set forth at the beginning of this paper is legislation of a character different from that upheld by the Supreme Court in the decisions which have been quoted. As claimed in the defendants' briefs, the law was designed "to regulate journalism." Relying upon its power over the mails, Congress threatened those publications which enjoy second-class rates with a denial of this privilege should they refuse to comply with certain conditions; and, moreover, it was made a crime to continue to use the second-class rates and violate the stipulation that all reading matter for the publication of which a valuable consideration is received "shall be plainly marked 'advertisement.'" Such regulations, without any reference to the

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[14] Public Clearing House *v.* Coyne, 194 U. S. 497 (1904). This case also decided that the power to determine whether a fraudulent use was being made of the mails could be delegated by Congress to the Postmaster General.

[15] The Supreme Court has held that no distinction can be drawn between *mala prohibita* and *mala in se*. (*In re* Rapier, *supra*.) It was argued that the mails could not be used to promote murder, arson, etc. (*mala in se*), but that, on the other hand, Congress had not equal power with regard to matters which it might *declare* criminal (*mala prohibita*). But, said the court, "it would be for Congress to determine what are within and what without the rule." Our present inquiry, however, is not concerned with this phase.

use of the mails, would be obviously outside the constitutional power of Congress.

By the narrow, but nevertheless convincing, line of reasoning just indicated, the Supreme Court, through Chief Justice White, justified the law without being put to the necessity of making any definite declaration as to the limits to which Congress may go in its exercise of what, lacking a better phrase, we may call "indirect regulation under the postal power."

The court's opinion shows that in the classification of mail matter there has been no attempt at uniformity, and that periodical publications have enjoyed special favors by reason of legislative adherence to what has been described as "the historic policy of encouraging by low postal rates the dissemination of current intelligence." [16] It is shown that as a condition precedent to being "entered as second-class mail matter," and enjoying the low rates which are maintained at a loss, the government demands answers to a score of questions concerning ownership, editorial direction, advertising discrimination, specimen copies, and circulation. To the Third Assistant Postmaster General is given the authority of accepting or rejecting applications for entry at the second-class rate.[17] The Supreme Court simply looked upon the "newspaper law" as laying down new conditions, compliance with which will continue the right "to enjoy great privileges and advantages at the public expense." Part of the opinion makes this clear:

"As the right to consider the character of the publication as an advertising medium was previously deemed to be incidental to the exercise of the power to classify for the purpose of the second-class mail, it is impossible in reason to perceive why the new condition as to marking matter, which is paid for as an advertisement is not equally incidental to the right to classify. And the additional exactions as to disclosure of stockholders, principal creditors, etc., also are as clearly incidental to the power to classify as are the requirements as to disclosure of ownership, editors, etc., which for so many years formed the basis of the right

[16] "Report of the Commission on Second-Class Mail Matter," 143. In his message of February 22, 1912, transmitting this report to Congress, President Taft said: "The findings of the commission confirm the view that the cost of handling and transporting second-class mail matter is greatly in excess of the postage paid, and that an increase in the rate is not only justified by the facts, but is desirable."

[17] "Postal Laws and Regulations" (1902), p. 198.

of admission to the classification. We say this because of the intimate relation which exists between ownership and debt; since debt, in its ultimate conception, is a dismemberment of ownership, and the power which it confers over an owner is, by the common knowledge of mankind, often the equivalent of the control which would result from ownership itself.

"Considered intrinsically, no completer statement of the relation which the newly exacted conditions bear to the great public purpose which induced Congress to continue, in favor of the publishers of newspapers, at vast expense, the low postal rate as well as other privileges accorded by the second-class mail classification can be made than was expressed in the report of the Senate committee, stating the intent of the legislation which we have already excerpted; that is, to secure to the public in 'the dissemination of knowledge of current events,' by means of newspapers, the names not only of the apparent, but of what might prove to be the real and substantial owners of the publications, and to enable the public to know whether matter which was published was what it purported to be, or was in substance a paid advertisement.

"We repeat that in considering this subject we are concerned not with any general regulation of what should be published in newspapers, not with any condition excluding from the right to resort to the mails, but we are concerned solely and exclusively with the right on behalf of the publishers to continue to enjoy great privileges and advantages at the public expense, — a right given to them by Congress upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded." [18]

## III. Proposed Extensions of the Postal Power.

It may be said, therefore, that the latest pronouncement of the Supreme Court lends little if any support to the doctrines of those who contend that under the post-roads clause Congress may extend federal control to limits which are almost unassignable. Let us examine some of these proposals.

It is, for instance, urged "that Congress prohibit the transmission by the mails or by telegraph or telephone from one State to another of orders to buy or sell or quotations or other information concerning transactions on any stock exchange, unless, among

[18] Lewis Publishing Co. *v.* Morgan, *supra.*

other conditions, such exchange shall (1) be a body corporate of the State or Territory in which it is located." [19]

A similar exercise of the postal power is advocated to secure corporate publicity since "Congress, by regulating the use of the mails and channels of interstate commerce, may compel every corporation engaged in any business, *whether interstate or not*, to give publicity to its corporate affairs, by legislation denying the use of the mails and the instruments of interstate commerce for the transmission of any matter concerning the affairs or business of any corporation that fails to make and file reports of the fullest nature concerning its organization and business, such, for example, as are already exacted from the interstate carriers under the Interstate Commerce Act. Such legislation would be valid and enforceable." [20]

It has also been suggested in Congress that an effective punitive method of dealing with monopolistic corporations would be to deny them postal facilities. If such corporations were violating the Sherman Act or were otherwise outlawed by valid legislation, a denial of the use of the mails would be justifiable if not constitutional. It would be manifestly absurd for the general government to aid subjects of its regulation in a violation of laws which it has passed. An analogous case is afforded by the provision of the Panama Canal Act of August 24, 1912, which says that no vessel owned by any company doing business in violation of any of the acts of Congress relating to interstate commerce "shall be permitted to enter or pass through said canal."

Such regulations, like that forbidding the use of the mails to defraud, are obviously different from that proposed by the Money Trust Committee. A law requiring that stock exchanges must have state charters as an antecedent to doing business would be *ultra vires* and thus unconstitutional; but it is being urged that Congress has the power indirectly to accomplish this very end. In other words, under the guise of passing legislation ostensibly based upon the postal clause of the Constitution, Congress, it is claimed,

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[19] "Majority Report of the Committee appointed to investigate the Concentration of Control of Money and Credit," Washington, February 28, 1913, p. 162. A bill embodying these recommendations is given on p. 170.

[20] Max Pam, "Powers of Regulation Vested in Congress," 24 HARV. L. REV. 77, 99. Italics in the original.

may indefinitely extend its control and encroach upon the reserved rights of the states.

If such a theory is correct, it is not too much to say that powers as great as those delegated in 1787 to the federal government, when in order to form a more perfect Union the Constitution was agreed to, will, by judicial construction, be taken from the states and given over to the national legislature. For, as it is hardly necessary to remark, the denial of postal and interstate commerce facilities would be almost as efficacious as positive legislation, since, without using the mails and the channels of trade, practically no business could exist. If congressional control may be thus extended, state lines will no longer exist, and the Tenth Amendment to the Constitution reserving the undelegated powers to the states or to the people will become a practical nullity.[21]

## IV. "Nullification by Indirection."

In the exercise of its taxing power, and less noticeably in its control of interstate commerce, Congress has been able indirectly to accomplish ends which were not included in the enumerated delegations when the Constitution was adopted. Thus, the tax on state bank notes was upheld on the ground that "the judiciary cannot prescribe to the legislative departments of the government limitations upon the exercise of its *acknowledged* powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected." [22]

Such a position, however, was easily justifiable on the ground that Congress had the power to stop the issue of state bank notes altogether if it thought this course necessary in order to provide an effective currency system, and the case thus loses much of its apparent importance.[23] More illustrative perhaps of the plenary

[21] It has also been urged that Congress may refuse corporations to whose size or organization it objects the right to sue in federal courts and may order national banks to refuse to receive their deposits. It is thus seen that the proposed development of the postal power to limits of doubtful constitutionality is merely one phase of a larger question of indirect government.

[22] Veazie *v.* Fenno, 8 Wall. (U. S.) 533 (1869). Italics are the author's.

[23] In Edye *v.* Robertson, 112 U. S. 580 (1884), the court said that the imposition "was upheld because a means properly adopted by Congress to protect the currency which it had created." The tax, therefore, was not subject to the ordinary rules.

power of Congress with respect to the raising of a revenue and less easy to explain, is the decision upholding such a heavy tax upon oleomargarine that its manufacture was made distinctly unprofitable. Thus, unable directly to regulate the manufacture, Congress achieved the same end through the exercise of its taxing power. The court said:

"The argument when reduced to its last analysis comes to this: that because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of lawful power whenever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department." [24]

Such a statement, it seems to me, is framed in unfortunate language, but, as will appear later, it is not necessarily a contradiction of the reasoning in the bank-note case to the effect that "there are indeed certain virtual limitations arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power [that of taxation] if so exercised as to impair the separate existence and independent self-government of the states *or if exercised for ends inconsistent with the limited grants of power in the Constitution.*" [25]

Not so marked, but nevertheless interesting, illustrations of this "nullification by indirection" are to be found in the interstate commerce legislation of recent years. Congress has assumed a control over the manufacture of food products by establishing standards of purity which must be met before the articles are admitted in interstate commerce.[26] The Mann White Slave Act extends federal control to immorality in the states, and in its decision upholding this law the court frankly admits that the means exerted "may have the quality of police regulations." [27] Proposals are now made to control manufacturing and trading companies, whether interstate or not, by compelling them to take out federal

[24] McCray *v.* United States, 197 U. S. 27 (1903). [25] Veazie *v.* Fenno, *supra.*
[26] Hippolite Egg Co. *v.* United States, 220 U. S. 45 (1911).
[27] Hoke *v.* United States, 227 U. S. 308 (1913); 36 Stat. at L. 825.

charters or licenses, and modify their organizations and business practices in accordance with federal regulations before they will be permitted to enjoy the facilities of interstate commerce. It is most strongly urged that the national legislature has the power to control labor conditions within the states, the most desired manifestation being a law putting articles made by children under specified ages in the same class with lottery tickets and impure food.

Up to this time, however, legislation under the commerce clause has developed little necessity for passing on the question whether Congress is approaching the limits of its power, for the indirect control effected by the various acts has been purely incidental in character or its subjects have been connected with interstate commerce. It is quite proper for Congress to build up an *Index Expurgatorius* just as it has done in the case of the mails, and to say that commerce shall not be polluted by the carriage of obscene literature, impure food, and made an agency to promote immorality. In practically every case, the power has not been exerted on *persons*, but on *things*, by reason of their inherent characteristics, and only once has there been any real "nullification by indirection." Here the Supreme Court by a forced interpretation of the statute destroyed much of its force.

I refer to the "commodities clause" of the Hepburn Interstate Commerce Act. This made it unlawful for any railroad to transport, except for its own use, any commodity other than timber, "manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect." [28] The court interpreted this as meaning that a railroad could still own stock in a *bonâ fide* corporation engaged in mining, etc., and could itself mine or produce commodities, but that before the transportation of these by the railroad began, the carrier would have to divorce itself of all interest by a real sale. Any other interpretation would have required the court to consider and decide several very "grave constitutional questions." [29] Such legislation as the "commodities clause," however, was "necessary and proper" in order to prevent evasions of the regulations providing for equality of rates, publica-

[28] 34 Stat. at L. 584; 35 Stat. at L. 60.

[29] United States *ex rel.* Atty. Gen. *v.* Delaware & H. Co., 213 U. S. 366 (1909).

tions of tariffs, etc., which Congress had imposed upon carriers engaged in interstate traffic.[30]

But even if it be constitutional to go much farther, and for Congress to control child labor and industrial corporations, postulating a power of prescribing arbitrary conditions for engaging in interstate commerce,[31] a different question is presented if it attempts to do a similar thing with reference to the mails. We must not lose sight of the almost unlimited nature of the taxing power, which, in Marshall's phrase, is "the power to destroy." Moreover, this power, and that of regulating commerce among the states, are *acknowledged*, while congressional control of the mails and the determination of who shall be permitted to enjoy postal facilities are functions *implied* from the six words in the Constitution. This difference may prove to be all important.

## V. A Legitimate End.

The rule adopted in the McCray case, even if correct, does not, it seems to me, materially modify Marshall's famous test:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional"; but "should Congress, under pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." [32]

The judiciary very rightly has nothing to do with the mere policy of legislation. When a particular exercise of *lawful* power is unwise, the responsibility of the legislature is to the people alone. But when an issue such as the one described by Marshall is involved, the courts are under a solemn duty to investigate and determine whether the enactment is what it purports to be, or whether it is designed to accomplish an object "not entrusted to the government." It has become almost axiomatic that "a thing may be within the letter of a statute and not within its meaning, and within

[30] See New York, N. H. & H. R. Co. *v.* Interstate Com. Com., 200 U. S. 361 (1906).

[31] That the federal legislature has such a power over interstate commerce is, I think, by no means settled.

[32] McCulloch *v.* Maryland, *supra*.

its meaning though not within its letter. The intention of the lawmaker is the law," [33] and to determine what this intention is the courts will resort to extrinsic evidence.

If Congress should see fit to pass a law denying stock exchanges the use of the mails unless they possess state charters, would it not be incumbent upon the courts, the intent of the statute being all important, to look at the substance of things, and determine whether the law was simply a postal regulation and thus valid, or whether it was an attempt to legislate concerning subjects which by the terms and spirit of the Constitution were meant to remain exclusively under state control? The Supreme Court has often made such an examination.

To take a recent instance, it considered at length the legislative history of the newspaper publicity law in order to show that the last and separate paragraph was not a distinct regulation, unrelated to the privileges of the second-class mail, and held that the report of the Senate committee showed conclusively "that there was no purpose to disintegrate the provision as it passed the House of Representatives, by making two enactments, or to do anything more than to exact additional conditions for the right to enjoy the second-class mail privileges." To make this clear, the court quoted from the committee's report.[34]

This theory of constitutional construction was given even more emphasis in another case:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." [35]

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[33] Smythe *v.* Fisk, 23 Wall. (U. S.) 374 (1874), cited with approval in Hawaii *v.* Mankichi, 190 U. S. 197 (1903).

[34] Lewis Pub. Co. *v.* Morgan, *supra*. Previously, in the same connection, the court remarked that "expressions in the debate, *upon concession for the sake of argument* that they are competent to be looked at," would not modify the view arrived at. See also United States *v.* Press Publishing Co., 219 U. S. 1 (1911).

[35] Mugler *v.* Kansas, 123 U. S. 623 (1887).

No power ought to be sought, much less adjudged, "in favor of the United States, unless it be clearly within reach of its constitutional charter." The courts are "not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution." [36]

The court has, moreover, adhered to "the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. . . . Constitutional provisions," adds Justice Brewer, "whether operating by way of grant or limitation, are to be enforced according to their letter and cannot be evaded by any legislation which, though not in terms trespassing upon the letter and spirit, yet in substance or effect destroys the grant or limitation." [37]

Sparingly, yet unhesitatingly, the Supreme Court has exercised its power of restraining the legislature, and, according to a recent compilation,[38] thirty-three statutes have, in whole or in part, been declared invalid. More than twelve of the laws were nullified on the ground that they encroached upon the powers reserved to the states and thus were *ultra vires*. None of these precedents, however, is on all fours with the issue which would be presented should Congress attempt to exercise its power over the mails for one of the ends already described. In all of the cases it was the positive, direct power which was denied because not vested in Congress.

Under the war amendments to the Constitution, Congress was held to have the right to pass only "corrective legislation"; "every valid act of Congress must find in the Constitution some warrant for its passage," said the court in one case.[39] Nor was the federal

[36] Houston *v.* Moore, 5 Wheat. 1 (1820).

[37] Fairbank *v.* United States, 181 U. S. 283 (1901). In Union Bridge Co. *v.* United States, 204 U. S. 364 (1907), this language was used: "If the means employed *have no substantial relation* to public objects which the government may legally accomplish, if they are arbitrary and unreasonable beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt."

[38] B. F. Moore, "The Supreme Court and Unconstitutional Legislation," 54 Columbia Univ. Studies, No. 2, 77.

[39] United States *v.* Harris, 106 U. S. 629 (1883). See also United States *v.* Fox, 95 U. S. 670 (1877), United States *v.* Reese, 92 U. S. 214 (1875), and James *v.* Bowman, 190 U. S. 127 (1902).

government permitted under the Internal Revenue Act of 1867 to regulate the sale of certain inflammable oils.[40] It was restrained also in regard to its power of taxation.[41] The first Employers' Liability Act was overruled because the line between *intra* and *inter* state commerce was not distinctly drawn.[42] Nor was Congress permitted, under its power of regulating foreign commerce, to make it a crime for anyone to harbor for immoral purposes an alien woman within three years of the time of entrance into this country. Such legislation, said the court, showed a tendency "to substitute one consolidated government for the present federal system." [43] Finally, the court has held that "there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part." [44]

Counsel in the newspaper case argued ingeniously but unsuccessfully that requiring the publication of the lists of stockholders and editors is a deprivation of property without due process of law, and that the assailed statute abridged the freedom of the press, but the court overruled both of these contentions as being without foundation. The right of the citizen to be secure from unreasonable searches and seizures is another constitutional restriction, and it is of course evident that the extension of the postal power must be accomplished without violating any of these limitations found in the Constitution itself, and which operate whether the power is acknowledged or implied. In particular instances, therefore, it would be an effective bar to the validity of legislation should there be an encroachment upon individual civil rights.[45]

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[40] United States *v.* Dewitt, 9 Wall. (U. S.) 41 (1869).

[41] The Collectors *v.* Day, 11 Wall. (U. S.) 113 (1870); Pace *v.* Burgess, 92 U. S. 372 (1876); Fairbank *v.* United States, 181 U. S. 283 (1901); Helwig *v.* United States, 188 U. S. 605 (1903).

[42] Employers' Liability Cases, 207 U. S. 463 (1907). Congress passed a second act drawn to meet the objections of the court and this was upheld in Second Employers' Liability Cases, 223 U. S. 1 (1912). See 32 Stat. at L. 232, 35 Stat. at L. 65, and 36 Stat. at L. 291.

[43] United States *v.* Keller, 213 U. S. 138 (1908).

[44] Adair *v.* United States, 208 U. S. 161 (1907).

[45] This was made clear in the Jackson case, *supra*. "But little need be said as to the clause forbidding Congress to pass any law 'abridging the freedom of speech, or of the press,' as that clause has been removed from the Constitution, so far as the mails

In the present discussion the possible effect of such constitutional limitations has not been considered, as the predominating issue has seemed to me to be whether Congress has the right to do indirectly what it has not the power directly to accomplish; whether it may use its authority over the post office, and its implied authority over the mails to extend federal regulation to stock exchanges, and subsequently, if such an exercise is sanctioned, to a thousand other fields now exclusively under the control of the states.

## VI. The Constitutional Limit.

It is thus evident that while a plenary power over the mails has been recognized in Congress, the courts have not indicated that it may be extended to arbitrary limits; in fact, their attitude would seem to support the contrary view. Certain it is that all past exclusions from the mail have had the "quality of police regulations";[46] and while there is no ground upon which to argue the point, it is certainly not illogical to maintain that further exclusions should be of this character only.

The indirect regulation of journalism, effected by the newspaper publicity law, was sustained by the court upon very narrow grounds. Publications are not compelled to comply with the provisions of the act; their alternative is to give up "the exceptional privileges of second-class rates" and pay larger postage. This case, then, lends no support to the arguments of those who advocate the control of stock exchanges and corporations through a federal regulation of the mails. For, as pointed out in the early part of this paper, the court expressly refused assent "to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of condition." embodied in the brief filed on behalf of the government.

This brief suggests, but does not press, a distinction which I believe the courts should and will hold to be controlling; there must be no "regulation of the private business of citizens in a manner beyond any express or implied power of Congress" on the ground

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are concerned, by the judgment rendered in 1892, *In re* Rapier." Hannis Taylor, "The Origin and Growth of the American Constitution," 230. This, however, is an extreme statement.

[46] Hoke *v.* United States, *supra.*

that such regulation "imposes as a penalty for disobedience a denial of an important federal privilege which Congress controls." If a law attempts this, it is invalid. Any legislation excluding from the mails should apply directly to the *things* mailed, not to the *persons* using the mails. This is the distinction which, as we have seen, is characteristic of much interstate commerce legislation. It is a distinction which, if valid, and I think the previous discussion has shown that it is, will prevent Congress from doing indirectly with regard to stock exchanges and corporations what it is unable to do directly. A fraudulent concern has the *use* of postal facilities, but when the mails aid in the fraud, it is *abuse*, and the federal government punishes. This practically resolves itself into the test mentioned above is the exclusion in the nature of a police regulation?

No extension of the postal power to subjects otherwise exclusively under the control of the states was ever contemplated by the framers of the Constitution or by its expounders until very recently. Alexander Hamilton arguing a century ago that Congress had the power to charter a bank, stated the precise issue:

"The only question," he said, "must be in this, as in every other case, whether the means to be employed, or in this instance, the corporation to be erected, has a natural relation to any of the *acknowledged* objects or *lawful* ends of the government. Thus, a corporation may not be erected by Congress for superintending the police of the city of Philadelphia, because they are not authorized to regulate the police of that city. But one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the states, or with the Indian tribes; because it is the province of the federal government to regulate these objects and because it is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage."[47]

This theory has been scrupulously followed by the decisions from McCulloch *v.* Maryland to the present time. Only one case is at variance, that of McCray *v.* United States, where a tax was upheld. The power to tax is *acknowledged*, that over the mails is *implied*. There is thus no inconsistency. But this vital difference in the nature of the power makes it most important that in the

[47] The Federalist (Ford's edition), 657.

extension of the postal authority the end be clearly legitimate; the means clearly proper and appropriate; the purpose one clearly sanctioned by the Constitution. In the proposed "nullification by indirection" under the post-roads clause the end is not legitimate, the means not appropriate, and the purpose one not warranted by the Constitution.

When this is the case, it is the privilege and duty of the courts to intervene. For, as Marshall asked, "to what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" [48] Subject the extension of the postal power to the test of reason, and the answer will be that the federal government may not thus do indirectly, what it is not permitted to accomplish directly. Consider the question in the light of the decisions of the Supreme Court, and the answer is the same. The court can take no other position "without abdicating its highest function and permitting the practical nullification of the Constitution itself." [49]

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[48] Marbury *v.* Madison, 1 Cranch 137.

[49] Victor Morawetz, "The Power of Congress to Enact Incorporation Laws and to Regulate Corporations," 26 HARV. L. REV. 667.